No. 90-95

In The
Supreme Court of the United States

OCTOBER TERM, 1989

THE PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,

Petitioners,

v.

CSX TRANSPORTATION, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Ohio, *et al.***

QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in concluding that a provision of the Federal Railroad Safety Act, 45 U.S.C. § 434, may be construed as the express intention of Congress to preempt Ohio statues and administrative regulations that are expressly preserved by the federal Hazardous Materials Transportation Act, 49 U.S.C.App. § 1811(a).

LIST OF PARTIES

The Public Utilities Commission of Ohio, and,
Jolynn Barry Butler, Chair
J. Michael Biddison, Commissioner
Ashley C. Brown, Commissioner
Richard M. Fanelly, Commissioner
Lenworth Smith, Commissioner,
in their respective capacities as Chair and Commissioners of the Public Utilities Commission of Ohio

CSX Transportation, Inc.
Consolidated Rail Corporation
Norfolk and Western Railway Company
Grand Trunk Western Railroad Company

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SUPPORTING THE PETITION FOR A WRIT OF CERTIORARI

The State of Washington
The State of Arizona
The State of California
The State of Louisiana
The State of Missouri
The State of Montana
The State of Nevada
The State of Texas
The National Association of Regulatory Utility Commissioners
The Railway Labor Executives' Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

INTRODUCTION

On July 12, 1990, Petitioners, the Public Utilities Commission of Ohio, *et al.*, filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. On August 29, 1990, the Respondents, CSX Transportation, Inc., Consolidated Rail Corporation, Norfolk and Western Railway Company, and Grand Trunk Western Railroad Company (Railroads), filed a Brief in Opposition. Briefs amicus curiae in support of granting the writ were filed on August 30, 1990, by the States of Washington, Arizona, California, Louisiana, Missouri, Montana, Nevada, Tennessee, and Texas, the National Association of Regulatory Utility Commissioners, and the Railway Labor Executives' Association.

The Railroad's Brief in Opposition requests that this Court, through denying the writ, place its imprimatur upon the authority of the lower federal courts to overrule the express requirements of a federal statute. The precedent sought by the Railroads is that state safety regulations touching upon any area of railroad operation must be presumed to be subject to federal preemption. To the well-established preemption analysis stemming from the decisions of this Court, the Railroads would have the Court add an overarching principle: any ambiguity in congressional intent should be resolved in favor of preempting the right of state governments to govern. In short, the Railroads hope to make preemption the rule, rather than the exception.

All of the Railroads' arguments are bent on focusing the Court's attention on the broad preemption language of the FRSA (45 U.S.C. § 434), and away from the express requirements of the HMTA that the transportation of hazardous materials be regulated only on an intermodal basis under the HMTA (49 U.S.C. §§ 1801, 1802(2), (6)), and that consistent state laws be preserved (49 U.S.C. § 1811(a)). The Railroads would have the Court apply general "rules of statutory construction" to "interpret" away the express language of the HMTA, and to rewrite the preemption analysis mandated by the Court's previous decisions. *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986); *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983).

If this Court's rules for determining federal preemption are to be preserved, certiorari must be granted in this case. Preemption may not be presumed. The decisions of this Court require that in reviewing preemption cases, courts must start with the *assumption*

that the historic police power of the states is not to be superseded by federal enactments "unless that was the clear and manifest purpose of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Thus, it is the most fundamental right of the states to protect the health and safety of state citizens that the Railroads have assailed. It is the protection of that fundamental state right that should compel the Court to review this important case.

REASONS FOR GRANTING THE WRIT

I. The decision of the lower court contravenes the express intention of Congress to preserve state laws that are consistent with the Hazardous Materials Transportation Act.

The linchpin of the Railroads' argument, and of the lower court's decision, is that Congress created a statutory conflict that must be resolved in favor of preemption. Thus, the lower court found that ". . . unlike the preemption provision of the FRSA, which forbids state regulation on subject matter on which the Secretary has already adopted a regulation, *the HMTA allows state regulations which are consistent with federal regulations.*" *CSX Transp., Inc. v. Public Utilities Comm'n of Ohio*, 901 F. 2d 497, 501 (6th Cir. 1990) (emphasis added). Thus, the lower court recognized that the HMTA expressly preserves consistent state laws. *See* 49 U.S.C.App. § 1811(a).

There can be no doubt that the HMTA applies to the transportation of hazardous materials by rail. It expressly applies to all modes of transportation. *See* 49 U.S.C. App. § 1801; 49 U.S.C.App. § 1802(2), (6). The conflict was created by means of the lower court's finding that Congress also intended the FRSA to apply to the intermodal transportation of hazardous materials. *CSX*, 901 F. 2d at 500-501. Having found two conflicting federal statutes to both be applicable, the lower court simply overruled the express preservation of state authority in the HMTA, in favor of the broad preemption of the FRSA.

Neither the decision of the lower court, nor the statutory interpretation urged by the Railroads, follows the principles of

statutory construction that both claim to apply. In this regard, both *presume* a "clear and manifest" congressional intent to extend the reach of the FRSA beyond "all areas of railroad safety," as expressly defined by Congress, to encompass the intermodal transportation of hazardous materials. The "plain meaning" of the FRSA has been ignored.

Congress left no doubt about the scope of the FRSA. As enacted, and as it exists today, the scope of the FRSA was limited to "all areas of railroad safety supplementing provisions of law and regulations in effect on October 16, 1970." 45 U.S.C. § 431(a). The HMTA, enacted in 1974 to apply to all modes of transportation, is clearly not a "law relating to railroad safety" under the express terms of the FRSA.

The lower court ignored the scope of preemption under the FRSA, and found that the express preservation of consistent state regulation under the HMTA could be given effect only if Congress had expressly repealed the FRSA. *CSX*, 901 F. 2d at 502. The Railroads have extended this misapplication of the rules of statutory construction, noting that the "implied repeal of an earlier statute by mere enactment of a later, even potentially conflicting one, is disfavored and should be avoided whenever possible." Respondent's Brief in Opposition at 14, *citing Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 (1984).

Clearly, the only statute that has been the subject of an "implied repeal" is the HMTA, by means of the lower court's "judicial repeal" of the express preservation of consistent state regulation, and the requirement that the transportation of hazardous materials be regulated on an intermodal basis. Certainly no repeal of the FRSA was necessary, because in enacting the HMTA Congress expressly removed from the FRSA any statutory authority to either regulate the intermodal transportation of hazardous materials, or to preempt state hazardous materials laws. *See* 49 U.S.C. § 1655(f)(3)(A) (1966) *amended by* 49 U.S.C. § 1655(f)(3)(A) (1975) (repealed 1983); Petition for a Writ of Certiorari at 18-27. The Secretary's statutory authority to regulate "railroad safety," which is required to be delegated to the Federal Railroad Administration (*see* 49 U.S.C. § 103(c)), was *expressly* amended to prohibit the regulation of the intermodal transportation of hazardous materials under the FRSA. Such authority was granted under, and limited to, the HMTA.

The lower court based its preemption decision upon the failure of Congress to "expressly repeal" that which had never been expressly enacted. Neither the HMTA, nor its predecessor, the Explosives and Other Dangerous Articles Act, had ever been expressly included as a "law relating to railroad safety" under the FRSA. In enacting the HMTA, Congress *expressly* removed the authority of the Secretary to regulate the transportation of hazardous materials under each of the modal safety statutes, including the FRSA. Congress *expressly* required intermodal regulation under the HMTA.

Similarly, both the Railroads and the lower court paid lip service to the principle of statutory construction holding that conflicting statutes should be reconciled if possible, so as to preserve the operation of each. *CSX*, 901 F. 2d at 502-503; Respondents' Brief in Opposition at 21-25. The effect of the lower court's decision, however, is to repeal the HMTA in favor of exclusive federal, and exclusively modal regulation under the FRSA. The lower court found federal preemption under the FRSA, a statute under which Congress expressly withdrew the Secretary's authority to regulate the transportation of hazardous materials. The statutory conflict created by the lower court was "reconciled" by the complete ouster of the HMTA, despite the clear expression of congressional intent evidenced by the HMTA.

There is no conflict between the goals of the respective statutes. One purpose of the FRSA is clearly to create a nationally uniform railroad system. The purpose of the HMTA is to regulate the transportation of hazardous materials on an intermodal basis, and to preserve consistent state laws. The only conflict in purpose was created by the lower court's erroneous conclusion that the FRSA applied to the intermodal transportation of hazardous materials. No conflict was created by Congress.

The HMTA preempts state laws that are inconsistent with the HMTA or regulations issued under the HMTA. 49 U.S.C.App. § 1811(a). "National uniformity," the goal of the FRSA, can hardly be impinged under the HMTA consistency requirement. State law must be consistent with federal law, or suffer preemption *under the HMTA*. The application of the FRSA, however, to consistent state laws regulating the intermodal transportation of hazardous materials, clearly defeats the purpose of the HMTA that hazardous materials transportation be regulated only on an intermodal basis under the HMTA. The lower court has effectively amended the

HMTA to apply to "all modes of transportation, *except rail*." Congress, however, inserted no such exception for railroads.

The familiar rules of statutory construction espoused by the Railroads serve only to obfuscate the error of the lower court's decision. An "interpretation," beyond the plain language of the statutes, is unnecessary. In enacting the HMTA, Congress expressly required that the transportation of hazardous materials, *by any mode*, be regulated under the HMTA. Consistent state laws were expressly preserved. The decision of the lower court serves only to create an exception to the HMTA for hazardous materials transported by rail. State laws that are clearly consistent with the HMTA are thereby preempted, and the manifest intent of Congress is defeated. Thus, a congressional intent to preempt was not only presumed, an express congressional intent to preserve consistent state regulation was vitiated. The lower court's faulty analysis, the potentially disastrous consequences for the safety of Ohio citizens, and the precedent destroying the states' most fundamental right to govern, can only be rectified by the review of this Court.

II. The decision of the lower court conflicts with applicable decisions of this Court.

The Railroads have requested that this Court ignore its own controlling decisions in *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986), and *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983). Instead, the Railroads would have the Court deny certiorari on the strength of one erroneous district court decision that was not appealed, and the dicta of two district court decisions that played no part in the actual disposition of the cited cases.

The Railroad's first claim to a wealth of consistent treatment by the lower federal courts is *Atchison, Topeka & Santa Fe Ry. Co. v. Illinois Commerce Comm'n*, 453 F. Supp. 920 (N.D. Ill. 1977). The *Atchison* court found any analysis other than broad federal preemption to be "overly technical." *Atchison*, 453 F. Supp. at 924. Because *Atchison* was not appealed, the Seventh Circuit Court of Appeals has had no opportunity to address the question presented by the case at bar.

Other than the decision to be reviewed in this proceeding, *no federal court of appeals has ever addressed the question* of whether the

FRSA may be construed to preempt state laws that are expressly preserved by the HMTA. In *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 671 F. Supp. 466 (W.D. Tex. 1987), another district court decision to which the Railroads would have this Court defer, the court opined in a footnote, without citation, that "an act by the Secretary pursuant to, for example, the HMTA could preempt state law under the terms of section 434 [of the FRSA]." *Missouri Pacific*, 671 F. Supp. at 471 n. 1. The court's speculation regarding the breadth of FRSA preemption was not germane to its decision, and the *Missouri Pacific* decision was affirmed on other grounds, without reference to the application of the FRSA to state intermodal hazardous materials requirements. The Fifth Circuit Court of Appeals found no need to address the lower court's unsubstantiated opinion that the HMTA is a "law relating to railroad safety," as defined by the FRSA. *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 850 F. 2d 264, 266 (5th Cir. 1988), *aff'g* 671 F. Supp. 466 (W.D. Texas 1987).

Finally, the Railroads have urged reliance upon *CSX Transportation, Inc. v. Tullahoma*, No. 4-87-47, slip op. (E.D. Tenn., Feb. 17, 1988), an unreported district court decision in which the issue germane to the case at bar was again addressed only in dictum, and not appealed. Thus, the string of "uniform" decisions that the Railroads would have this Court approve by denying the writ in this case consists of trial court dicta that has not even been reviewed by a federal court of appeals.

Yet, it is clear that a trend is developing. Without clarification of the appropriate standard of review in cases of federal preemption, the lower federal courts will undoubtedly continue to accept the easy answer that the broad preemption language of the FRSA may be construed to override the express intention of Congress that transportation be regulated only on an intermodal basis, and that consistent state laws be preserved. The denial of certiorari in this case can serve only to dilute, if not destroy, the preemption analysis mandated by this Court in *Louisiana* and *Pacific Gas*.

The message of the *Louisiana* and *Pacific Gas* decisions is straightforward: only Congress may displace state law. Where Congress has, by statute, preserved a measure of state authority in an area otherwise subject to broad preemption, the lower federal courts may not impose preemption over the expressed intention of Congress.

In both *Louisiana* and *Pacific Gas*, this Court weighed a federal statute requiring broad preemption, against a federal statute expressly preserving a sphere of authority within that broad preemption in which the states were free to regulate for the protection and benefit of state citizens. Contrary to the decisions of the lower court, in *Louisiana* and *Pacific Gas* this Court presumed that the police power of the states was not to be displaced unless Congress manifestly and *specifically* required preemption. In both cases the Court found that it was not the function of the judiciary to rewrite federal statutes in order to override a clear reservation of state authority.

The Railroads have attempted to distinguish *Louisiana* and *Pacific Gas* because in those cases the Court weighed competing sections within a larger federal statute, as opposed to the case at bar, where two federal statutes have been drawn into conflict. This "distinguishing factor" is patently illusory. The Railroads have cited no basis, in logic or precedent, that would contradict the rule that two statutes should be construed to avoid a conflict for the same reasons that separate sections within a larger statutory scheme should be so construed.

In *Louisiana*, this Court examined the Communications Act of 1934, and weighed 47 U.S.C. § 151 and § 220 (permitting broad preemption), against 47 U.S.C. § 152(b) (preserving state authority). *Louisiana*, 476 U.S. at 360-67. In *Pacific Gas*, this Court examined the Atomic Energy Act, and weighed 42 U.S.C. § 2021(c) (permitting broad preemption), against 42 U.S.C. § 2018 and § 2021(k) (preserving state authority). *Pacific Gas*, 461 U.S. at 208-11. In the case at bar, the State of Ohio has requested only that the Court apply the same analysis, weighing 45 U.S.C. § 434 (permitting broad preemption), against 49 U.S.C.App. § 1811(a) (expressly preserving state authority).

The decisions of this Court in *Louisiana* and *Pasific Gas* are clearly applicable to the case at bar. In enacting the HMTA, Congress required intermodal regulation and expressly preserved consistent state laws. As in *Louisiana* and *Pasific Gas*, the Court should again uphold the manifest intent of Congress permitting state governments to protect the health and safety of state citizens through reasonable and consistent regulations.

CONCLUSION

Federal preemption, implied and judicially imposed, is final. The hands of state government are tied, and the threat to be eliminated by state safety laws is allowed to persist. This Court has historically served as the final resort for state citizens against a central bureaucracy that would overwhelm the principles of federalism upon which the Constitution was founded. To preserve state sovereignty, this Court long ago created the rule of law that *pre-emption may not be presumed* unless that was the clear and manifest purpose of Congress. The lower courts have in the case at bar sought to erode that rule of law by presuming federal preemption in the face of statutes clearly preserving state authority. If the principle of federalism is still important, if federal statutes are to be limited to what they say, and if the manifest intent of Congress is to prevail, this Court must review and reverse the decision of the lower court.

For the foregoing reasons, Petitioners respectfully submit that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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